Supreme Court, U.S.
FILED
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No. 93-877

In The

Supreme Court of the United States

October Term, 1993

EDITH M. GRACEY,

Petitioner,

vs.

BARBARA M. DAY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to justify the Supreme Court's power of supervision.

2. Whether alleged errors pertaining to consideration of briefs or transmittal of the record on appeal constitute anything other than harmless error.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of Jurisdiction 2

Rules and Statutory Provisions Involved 3

Statement of the Case 4

Summary of Argument 6

Reasons for Denying the Writ 7

I. The United States Court of Appeals for the Third Circuit has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by a lower court. 7

II. Alleged errors pertaining to consideration of briefs or transmittals of the record on appeal, if in existence, constitute nothing other than harmless error. 10

Conclusion 12

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Gracey v. Day, No. A-928, 487 U.S. 1202 (June 20, 1988) 5

Gracey v. Day, Nos. 88-137, A-95, 488 U.S. 880 (October 3, 1988) 5

Gracey v. Day, No. 88-137, 488 U.S. 950 (November 7, 1988) 5

Gracey v. Day, No. 88-1934, 492 U.S. 920 (July 3, 1989) 5

Gracey v. Day, et al., No. 93-1048 (3d Cir. June 3, 1993) 1

Gracey v. Day, et al., No. 93-1048 (3d Cir. Sept. 9, 1993) 1

Gracey v. Riegle, No. 90-637, 498 U.S. 1012 (December 10, 1990) 5

Gracey v. Riegle, No. 90-1906, __ U.S. __, 112 S. Ct. 77 (October 7, 1991) 4

Gracey v. United States, No. A-610, 480 U.S. 913 (March 9, 1987) 5

Contents

Page

Gracey v. United States, No. 87-406, 484 U.S. 914 (October 19, 1987) 5

Gracey v. United States, No. 87-406, 484 U.S. 982 (December 7, 1987) 5

In re Gracey, No. 84-0778T (Bankr., E.D. Pa. Sept. 29, 1992) 2

In re Gracey, No. 84-0778T (Bankr., E.D. Pa. Nov. 20, 1992) 2

In re Gracey, No. 92-7237 (E.D. Pa. Jan. 14, 1993) 2

In re Gracey, No. 92-7380 (E.D. Pa. Jan. 14, 1993) 2

In re: Jeanette Corp., 832 F.2d 43, 9 F.R.S. 3d 412 (3rd. Cir. 1987) 2

Statutes Cited:

Pa. Stat. Ann. tit. 41, § 201 3

Pa. Stat. Ann. tit. 41, § 301(b) 3

11 U.S.C. § 547 5

28 U.S.C. § 158(a) 2

28 U.S.C. § 158(d) 2

28 U.S.C. § 1254(1) 2

Contents

Page

United States Constitution Cited:

Article III, Section Two 2

Rules Cited:

Bankruptcy Rule 9005 ..... 4, 10

Fed. R Civ. P. 61 ..... 3, 4, 10

Sup. Ct. R. 15.6 4

Sup. Ct. R. 15.7 10

APPENDIX

Appendix A — Order of the United States District Court for the Eastern District of Pennsylvania Filed November 19, 1987 ..... 1a

Appendix B — Order of the United States Court of Appeals for the Third Circuit Dated August 1, 1989 ..... 2a

Appendix C — Table of Contents to Petitioner's Appendix Submitted to the United States Court of Appeals for the Third Circuit 3a

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In The

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EDITH M. GRACEY,

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Gracey v. Day, et al., No. 93-1048 (3d Cir. Sept. 9, 1993) (Petition for rehearing denied);

Gracey v. Day, et al., No. 93-1048 (3d Cir. June 23, 1993) (affirming E.D. Pa. Order of Jan. 14, 1993);

In re Gracey, No. 92-7237 (E.D. Pa. Jan. 14, 1993) (affirming Bankr., E.D. Pa. Order of Nov. 20, 1993);

In re Gracey, No. 92-7380 (E.D. Pa. Jan. 14, 1993) (dismissing erroneously docketed appeal);

In re Gracey, No. 84-0778T (Bankr., E.D. Pa. Nov. 20, 1992) (denying Gracey's motion for reconsideration, and establishing 14% interest rate as valid under Pennsylvania law.);

In re Gracey, No. 84-0778T (Bankr., E.D. Pa. Sept. 29, 1992) (sustaining Gracey's objection to interest rate insofar as it may exceed rate permitted under Pennsylvania law).

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction to hear the appeal of a final order and decree entered by the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in proceedings under Title 11 of the United States Code, under the authority of 28 U.S.C. § 158(a).

The Court of Appeals for the Third Circuit had jurisdiction to hear this matter as an appeal from a final decision, judgment or order entered under Title 11 of the United States Code, by virtue of the authority of 28 U.S.C. § 158(d). *In re: Jeanette Corp.*, 832 F.2d 43, 9 F.R.S. 3d. 412 (3rd. Cir. 1987).

The Supreme Court of the United States has jurisdiction to hear this matter pursuant to Article III, Section Two of the United States Constitution as it is a case arising under the Laws of the United States. The Supreme Court of the United States may choose to review this matter by writ of certiorari granted upon the petition of any party pursuant to 28 U.S.C. § 1254(1).

RULES AND STATUTORY PROVISIONS INVOLVED

Pa. Stat. Ann. tit. 41, § 201:

> Except as provided in Article III of this act, the maximum lawful rate of interest for the loan or use of money in an amount of fifty thousand dollars ($50,000.00) or less in all cases where no express contract shall have been made for a less rate shall be six percent per annum.

Pa. Stat. Ann. tit. 41, § 301(b):

> The maximum lawful rate of interest for residential mortgages, as defined in this act, entered into or contracted for during any calendar month shall be equal to the Monthly Index of Long Term United States Government Bond Yields for the second preceding calendar month plus an additional two and one-half percent per annum rounded off to the nearest quarter of one percent per annum.

Fed. R. Civ. P. 61:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must

> disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Bankruptcy Rule 9005:

> Rule 61 F.R. Civ. P. applies in cases under the Code. When appropriate, the court may order the correction of any error or defect or the cure of any omission which does not affect substantial rights.

Sup. Ct. R. 15.6:

> A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner, but distribution and consideration by the Court under paragraph .5 of this Rule will not be delayed pending its filing. Forty copies of the reply brief, prepared in accordance with Rule 33 and served as prescribed by Rule 29, shall be filed.

STATEMENT OF THE CASE

The Petitioner's request for certiorari to the United States Court of Appeals for the Third Circuit in this matter represents that party's tenth such petition or related request for relief presented before your Honorable Court. All stem from the Petitioner's proceeding in bankruptcy before the United States Bankruptcy Court for the Eastern District of Pennsylvania, and thus far all have been denied. The citations are as follows:

Gracey v. Riegle, No. 90-1906, ___ U.S. ___, 112 S. Ct. 77 (October 7, 1991) (denial of cert.);

Gracey v. Riegle, No. 90-637, 498 U.S. 1012 (December 10, 1990) (denial of cert.);

Gracey v. Day, No. 88-1934, 492 U.S. 920 (July 3, 1989) (denial of cert.);

Gracey v. Day, No. 88-137, 488 U.S. 950 (November 7, 1988) (denial of reh'g);

Gracey v. Day, Nos. 88-137, A-95, 488 U.S. 880 (October 3, 1988) (denial of cert., denial of stay);

Gracey v. Day, No. A-928, 487 U.S. 1202 (June 20, 1988) (denial of injunction, other relief);

Gracey v. United States, No. 87-406, 484 U.S. 982 (December 7, 1987) (denial of reh'g);

Gracey v. United States, No. 87-406, 484 U.S. 914 (October 19, 1987) (denial of cert.);

Gracey v. United States, No. A-610, 480 U.S. 913 (March 9, 1987) (denial of stay).

The instant issue concerns the interest due on a mortgage. The Petitioner, Edith M. Gracey, challenged the 14% rate of interest specified in the mortgage instrument. There is no dispute that the Petitioner did not pay the principal amount with accrued interest on the due date, and accordingly the Note and consensual lien were in default after September 23, 1983. The Respondent/mortgagee, Barbara M. Day, a secured creditor, never foreclosed on the mortgage. An earlier confessed judgment on the note was never executed upon; rather, it was stayed and avoided by the Petitioner by operation of 11 U.S.C. § 547. In determining the propriety of the mortgage rate, The United States Bankruptcy Court for the Eastern

District of Pennsylvania looked to the maximum interest rate allowable under state law at the time the mortgage was executed. That Court's November 20, 1992 Order (Petitioner's Appendix, C4-6) found the 14% interest rate under the mortgage to be valid.

Petitioner appealed to the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit, both of which affirmed the Bankruptcy Court's findings (Petitioner's Appendix, A, B1-3).

SUMMARY OF ARGUMENT

The United States Bankruptcy Court for the Eastern District of Pennsylvania, the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit correctly interpreted the interplay between Pennsylvania statutes providing for the regulation of interest rates. No valid constitutional questions are in issue. There was no departure from the accepted and usual course of judicial proceedings conducted by or sanctioned by the Third Circuit, and any error cited by the petitioner falls far short of creating a procedural due process issue. Error, if any, lies within the ambit of "harmless error" as defined by the Federal Rules of Civil Procedure.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, NOR HAS IT SANCTIONED SUCH A DEPARTURE BY A LOWER COURT.

The Third Circuit properly affirmed the findings of the lower court. While the Petitioner is unhappy with the result, that alone does not create an issue ripe for determination by this Honorable Court. The only departure from the usual course of judicial proceedings sanctioned by the Third Circuit and the lower courts has occurred in favor of the Petitioner.

The present proceeding is the culmination of the third Objection filed by the Petitioner against the Respondent's Proof of Claim in the Bankruptcy Court on April 24, 1992. Respondent's Proof of Claim was filed more than six years before, on November 22, 1985.

Petitioner's propensity for filing frivolous and unwarranted appeals led the United States District Court for the Eastern District of Pennsylvania, on November 18, 1987 to permanently enjoin her from filing interlocutory appeals and motions from nonappealable orders. Respondent's Appendix A. On August 1, 1989 the Third Circuit granted the Respondent attorney's fees as just damages for the Petitioner's continuing frivolous appeals. Respondent's Appendix B.

Nonetheless, the courts below have again shown patience and restraint, allowing the Petitioner to undertake her latest legal maneuvers, granting her as a *pro se* litigant every opportunity to make her case.

Petitioner asserts that the Bankruptcy Court "changed the issue" from that which she wished to argue. Petition at 3. However, Petitioner's "issue" was found to be without legal merit. On appeal, the United States District Court for the Eastern District of Pennsylvania succinctly explained the Bankruptcy Court's November 20, 1992 holding as it regards Pennsylvania law:

> Debtor contends that the maximum interest rate the claimant is entitled to is the general post judgment interest rate of 6% per annum. contained in Pa.Stat.Ann. tit. 41, § 201. Debtor is incorrect.
>
> Pa.Stat.Ann. tit. 41 § 201 states:
>
> *Except as provided in Article III of this act,* the maximum lawful rate of interest for the loan or use of money in an amount of fifty thousand dollars ($50,000.00) or less in all cases where no express contract shall have been made for a less rare shall be six percent per annum.

(emphasis added). Pa. Stat. Ann. tit. 41, § 301(b), which is part of Article III of Act 6, states:

> The maximum lawful rate of interest for residential mortgages, as defined in this act, entered into or contracted for during any calendar month shall be equal to the Monthly Index of Long Term United States Government Bond Yields for the second preceding calendar month plus

> an additional two and one-half percent per annum rounded off to the nearest quarter of one percent per annum.
>
> The debtor admits that the mortgage she gave to claimant is a residential mortgage. Pa. Stat. Ann. tit. 41, § 301(b) specifically provides for the maximum lawful rate of interest for residential mortgages and, therefor, it and not § 201 is controlling here.
>
> The parties agree that the debtor gave the residential mortgage to the claimant on September 23, 1982 and that the mortgage provides for interest to be assessed at 14%. The pertinent portion of the August 14, 1982 edition of the Pennsylvania Bulletin, vol. 12, no. 33, which claimant provided to the Bankruptcy Court, states that the maximum lawful rate of interest for residential mortgages for the month of September 1982 is 15.5%. Accordingly, the Bankruptcy Court correctly determined that the 14% rate of interest sought by the claimant does not exceed the maximum rate permitted to be collected under § 301.

Petitioner's Appendix at B-1 - B-3.

The Petitioner's third set of Objections to Respondent's claim in bankruptcy was carefully considered by the courts below. Petitioner received every benefit to be afforded a *pro se* litigator, and her position was found to be without legal grounds.

II.

ALLEGED ERRORS PERTAINING TO CONSIDERATION OF BRIEFS OR TRANSMITTALS OF THE RECORD ON APPEAL, IF IN EXISTENCE, CONSTITUTE NOTHING OTHER THAN HARMLESS ERROR.

Fed. R. Civ. P. 61 mandates that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Bankruptcy Rule 9005 applies this rule to cases under the Bankruptcy Code. Petitioner makes two apparent due process claims concerning alleged errors, none of which affects the substantial rights of the parties. They will be addressed *seriatim.*

Petitioner first claims that her rights to due process were denied as the United States District Court issued its Order affirming the Bankruptcy Court's judgment before receiving Petitioner's reply brief. Petitioner cites no case law for her proposition that consideration of a reply brief is constitutionally required. If such a proposition is valid, it would be incongruous that the Supreme Court's own rules do not require court consideration of a reply brief. For instance, Supreme Court Rule 15.7, regarding replies to a brief in opposition to certiorari, states the following:

> A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner, *but distribution and consideration by the Court . . . will not be delayed pending its filing.*

(emphasis added). A court *may* consider a reply brief. The Petitioner raises no colorable claim to suggest that it must.

Second, Petitioner claims that a portion of the record, specifically one of her briefs to the district court, was improperly omitted from the record transferred to the Third Circuit. She does not say how the presence of this particular brief would have changed the outcome on appeal. In fact, the Third Circuit has had a very good grasp of Petitioner's unvarying legal arguments over the years. Moreover, the Petitioner herself included with her brief to the Third Circuit a 149-page appendix which contained the allegedly missing district court brief. The table of contents to the Petitioner's Third Circuit appendix, attached hereto as Respondent's Appendix C, shows that the Petitioner included her district court brief at page 82.

The petitioner also raised the missing brief issue before the Third Circuit in her Amended Petition for Rehearing. The Third Circuit denied rehearing by Order of September 9, 1993. Petitioner's Appendix at D. Petitioner has received the process to which she is due.

CONCLUSION

The Petitioner has failed to raise any colorable constitutional issues before this Honorable Court, and has further failed to show that the Third Circuit either departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court. Her case in bankruptcy has continued now for more than eight years. The Petition for Certiorari should be denied.

Respectfully submitted,

MARK L. TUNNELL
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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED NOVEMBER 19, 1987

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BANKRUPTCY NO. 84-00778T

CIVIL ACTION NO. 87-7080W

IN RE:

EDITH M. GRACEY, Debtor

ORDER

AND NOW, this 18th day of November, 1987, the debtor, Edith W. Gracey, appearing *pro se*, is hereby permanently enjoined from filing any interlocutory appeal or other motion from a nonappealable order unless she first presents a copy thereof to the undersigned and receives approval for its filing in writing.

The Clerk shall be notified to refuse such documents aforesaid unaccompanied by the written approval of the undersigned.

BY THE COURT,

s/ Charles R. Weiner
J.

ENTERED: 11/19/87

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AUGUST 1, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-8016 July 26, 1989

IN RE:
EDITH M. GRACEY, Appellant

Present: BECKER, GREENBERG and SEITZ, *Circuit Judges*.

Motion of Appellee Barbara M. Day for Award of Counsel Fees as Just Damages for Continuing Frivolous Appeals,

Answer of Appellant to Above Motion,

s/ Gretchen A. Thompson
Deputy Clerk 7-1092

ORDER

The foregoing Motion is granted. Appellant shall pay to appellee the sum of $2,031.25 in counsel fees and expenses.

By the Court,
s/ Edward R. Baker
Circuit Judge

Dated: August 1, 1989
GT/cc: Ms. Edith M. Gracey
Mark Tunnell, Esq.
Frederick Reigle, Esq.
Kurt Althouse, Esq.

APPENDIX C — TABLE OF CONTENTS TO PETITIONER'S APPENDIX SUBMITTED TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX OF APPELLANT GRACEY

TABLE OF CONTENTS

Page	*Document*
i.	NOTICE OF APPEAL TO THIRD CIRCUIT.
ii	COPY OF DISTRICT COURT DOCKET-CIVIL NO. 92-7237
1.	OBJECTION OF DEBTOR TO CLAIM OF BARBARA M. DAY (CLAIM #17).
13.	DEBTOR'S REPLY TO: "ANSWER OF BARBARA DAY TO DEBTOR'S OBJECTION".
24.	MEMORANDUM OF LAW FOR DEBTOR GRACEY.
42.	ORDER of September 29, 1992 SUSTAINING DEBTOR'S OBJECTION IN PART.
44.	MOTION FOR RECONSIDERATION OF ORDER DATED SEPTEMBER 29, 1992.
53.	REPLY OF DEBTOR TO: "ANSWER OF DAY TO MOTION FOR RECONSIDERATION" AND "INTEREST CALCULATIONS DUE NOVEMBER 2, 1992".
61.	AMENDED REPLY OF DEBTOR TO "ANSWER OF DAY TO RECONSIDERATION".
62.	GRACEY "ENTRY OF APPEARANCE FORM" from November 5, 1992 hearing.

Appendix C

EVIDENCE admitted by BENCH ORDER at hearing on November 5, 1992:

65. "(D-1)" *SETTLEMENT SHEET* (Proof of payment to Day of $61,116.89).

68. "(D-2)" *SETTLEMENT SHEET* (Proof of payment to Day of $28,271.09)

70. "(D-3)" *DAY CONTRACT* (Proof that the contract is silent regarding any post-judgment interest rate).

78. ORDER of November 20, 1992 (which discusses the CONTRACT rate RATHER THAN the objection issue which was the POST-JUDGMENT rate).

80. OBJECTION OF APPELLANT GRACEY TO APPELLEE DAY'S "STATEMENT OF ISSUES" (Day switched the appeal issue to contract rate).

81. NOTICE OF APPEAL TO THE DISTRICT COURT.

82. DISTRICT COURT BRIEF OF APPELLANT GRACEY.

93. DISTRICT COURT BRIEF OF APPELLEE DAY.

121. DISTRICT COURT REPLY BRIEF OF GRACEY.

134. TRANSCRIPT: November 5, 1992 Bankruptcy hearing.

141. "STATEMENT OF THE ISSUES" OF GRACEY (POST-JUDGMENT RATE).

142. "STATEMENT OF THE ISSUES" OF DAY (MAXIMUM CONTRACT RATE).

143. OBJECTION OF APPELLANT GRACEY TO DAY SWITCHING THE APPEAL ISSUE.

144. DISTRICT COURT ORDER OF JANUARY 14, 1993.

146. BANKRUPTCY COURT ORDERS: Sept. 29, 1992 and Nov. 20, 1992.